

I accordingly hold that these proceedings by originating summons are incompetent as they do not come within the requirements of Order 54A rule 1A.

Jurisdiction

Second, on the question of jurisdiction, Article XLVII(1) and (4) of the State Constitution reads:

"XLVII. (1) Every member of the Legislative Assembly shall before taking his seat take and subscribe before the person presiding in the Assembly the following Oath:

'I, _____, having been elected as a member of the Legislative Assembly of the State of Perak, do solemnly swear (or affirm) that I will faithfully discharge my duties as such to the best of my ability, that I will bear true faith and allegiance to the State of Perak and to the Federation of Malaya, and that I will preserve, protect and defend the Constitution of the State of Perak';

and, if a subject of His Highness, until he shall also have taken and subscribed in similar fashion the following Oath of Allegiance:

'I, _____, do swear that I will be faithful and bear true allegiance to HIS HIGHNESS,

, and His Successors,

according to law.'

....

....

(4) If a member has not taken his seat within three months from the date on which the Legislative Assembly first sits after his election or such further time as the Assembly may allow, his seat shall become vacant."

Article XXXIII of the State Constitution provides:

"XXXIII. If any question arises whether a member of the Legislative Assembly has become disqualified for membership, the decision of the Assembly shall be taken and shall be final."

It is clear from the provisions of Article XXXIII that the Assembly is the final arbiter in any question arising as to whether a member of the Assembly has become disqualified for membership. Article XXXIV (1) provides that if a member of the Assembly becomes disqualified for membership of the Assembly or dies, his seat shall become vacant. The effect of Article XLVII(4) therefore is that if a member has not taken his seat within three months from the date of the first sitting of the Assembly after his election or such further time as the Assembly may allow, his seat shall become vacant as he is then disqualified for membership. Under Article XXXIII when a question as to disqualification of a member arises, it is the Assembly which decides, and finally, on the matter, and that that is so is reinforced by the provision in Article XLVII(4) for the extension of the stipulated period of three months by "such further time as the Assembly may allow".

I have already referred to the provisions of Article 72(1) of the Federal Constitution which might perhaps also affect the position as well, as the originating summons in raising the matter of the 1st respondent not having taken the oath as a member of the Assembly although he had in fact taken the oath as Speaker after his election as such under Standing Order 1(c) of the Assembly's Standing Orders might appear in effect to question the validity of the internal proceedings of the Assembly.

In the light of these constitutional provisions, it is clear that the two matters raised in these proceedings are for the Assembly to decide and within its exclusive jurisdiction, and not for the courts to determine.

A Under the *lex et consuetudo parliamenti*, the Assembly has control over its proceedings, procedure and members and may decide questions as to their qualifications and disqualification. The provisions in the Federal and State Constitutions I have discussed crystallise and encapsulate this important principle of non-justiciability of its intra-mural activities in the courts which may perhaps be appropriately termed the Bradlaugh principle, highlighted in *Bradlaugh v. Gossett*⁽³⁾ as a result of the House of Commons in England preventing an elected atheist from exercising his statutory right of making the member's oath by affirmation. The oath being a precondition to the right to participate in proceedings of the House, the plaintiff was thus prevented from taking his seat.

B The court ruled that the matter was not justiciable before it — only Parliament was competent to regulate and for that purpose judge the validity of its intra-mural activities. I should perhaps add as a corollary to that case that the plaintiff's electorate disagreed with Parliament — he was elected five times in as many years, and it was only on the last occasion that he was allowed to take his seat.

Conclusion

In the result, it follows that the respondents' application succeeds. The applicant's main summons which is misconceived fails accordingly *in limine* and is dismissed with costs.

Order accordingly.

Solicitors: Ngan Siong Hing & Co.

F JAYARAMAN & ORS. v. PUBLIC PROSECUTOR

[R.Cr.J. (Harun J.) February 22, 1979]

[Kuala Lumpur — Criminal Revision No. 1 of 1979]

Criminal Law and Procedure — Charges — Four charges against eight accused persons — Whether could be tried jointly — Same transaction — Discretion of the Court — Courts of Judicature Act, 1964, s. 35 — Criminal Procedure Code (F.M.S. Cap. 6), ss. 163, 165, 166 and 170.

G In this case the eight accused were jointly charged with four charges of culpable homicide not amounting to murder. At the commencement of the hearing before the Sessions Court the learned Deputy Public Prosecutor applied for the trial to proceed on the first three charges with the fourth charge being stayed. The defence objected to such a course on the grounds that the accused will be in double jeopardy in that there would be two separate trials in respect of offences alleged to have been committed which arise out of the same transaction. The learned President of the Sessions Court ordered the trial to proceed on the first three charges and stayed the hearing of the fourth charge. At the request of the defence the learned President adjourned the hearing to enable the High Court to give the necessary directions under section 35 of the Courts of Judicature Act, 1964.

H Held: (1) the four alleged offences in this case were committed in a series of acts so connected as to form one transaction and the case falls within the exception contained in section 170 of the Criminal Procedure Code and the cases could be tried together;

(2) the discretionary power to order whether the charges should be heard jointly or separately is that of the court and not the prosecution. In this case the Sessions Court should be directed to proceed with the trial on all four charges jointly.

Cases referred to:-

- (1) *Subramania Ayyar v. King-Emperor* 28 I.A. 257.
- (2) *Chin Choy v. Public Prosecutor* [1955] M.L.J. 237.
- (3) *Lim Yean Leong v. Public Prosecutor* [1940] M.L.J. 216.
- (4) *Babulal Choukhani v. Emperor* A.I.R. 1938 P.C. 130.
- (5) *Cheong Sik Kwan v. Public Prosecutor* [1959] M.L.J. 189.
- (6) *Amrita Lal Hazra v. Emperor* 42 Cal. 957.
- (7) *Public Prosecutor v. Datuk Harun bin Haji Idris & Ors.* [1976] 2 M.L.J. 116.
- (8) *R. v. Grondkowski and R. v. Malinowski* [1946] 1 K.B. 369.
- (9) *R. v. Sakandar Khan* [1939] M.L.J. 123.
- (10) *Mohamed Ramly b. Haji Rasip v. Public Prosecutor* [1941] M.L.J. 31.

CRIMINAL REVISION.

D.P. Vijendran (Chandran with him) for the applicants.

Muhammad Shaffee bin Mohamed Abdullah (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Harun J.: These eight accused were jointly charged before the Sessions Court at Kelang as follows:

1st Charge:

That you jointly on 19th August, 1978, at about 2.30 a.m. at the Sri Subramaniam Temple, Kerling, in the District of Ulu Selangor, in the State of Selangor, in furtherance of the common intention of you all, did cause the death of Mohd. Amin bin Doyak with the intention of causing such bodily injury as was likely to cause death and you have thereby committed an offence of culpable homicide not amounting to murder, punishable under Section 304 Part I of the Penal Code and read together with Section 34 of the same Code.

2nd Charge:

That you jointly on 19th August, 1978, at about 2.30 a.m. at the Sri Subramaniam Temple, Kerling, in the District of Ulu Selangor, in the State of Selangor, in furtherance of the common intention of you all, did cause the death of Mispan bin Tunut with the intention of causing such bodily injury as was likely to cause death and you have thereby committed an offence of culpable homicide not amounting to murder, punishable under Section 304 Part I of the Penal Code read together with Section 34 of the Penal Code.

3rd Charge:

That you jointly on 19th August, 1978, at about 2.30 a.m. at the Sri Subramaniam Temple, Kerling, in the District of Ulu Selangor, in the State of Selangor, in furtherance of the common intention of you all, did cause the death of Suppian bin Ali with the intention of causing such bodily injury as was likely to cause death and you have thereby committed an offence of culpable homicide not amounting to murder, punishable under Section 304 Part I of the Penal Code read together with Section 34 of the same Code.

4th Charge:

That you jointly on 19th August, 1978, at about 2.30 a.m. at the Sri Subramaniam Temple, Kerling, in the District of Ulu Selangor, in the State of Selangor, in furtherance of the common intention of you all, did cause the death of Ahmad Nasiruddin bin Bunyamin with the intention of causing such bodily injury as was likely to cause death and you have thereby committed an offence of culpable homicide not amounting to murder, punishable under Section 304 Part I of the Penal Code and read together with Section 34 of the same Code.

At the commencement of the hearing, the learned Deputy Public Prosecutor applied for the trial to proceed on the first three charges with the fourth charge being stayed on the grounds that if the trial were to proceed on all four charges it will offend against section 164 of the Criminal Procedure Code (C.P.C.) and the trial would consequently be a nullity.

A The defence objects to such a course on the grounds that the accused will be placed in double jeopardy in that there would be two separate trials in respect of offences alleged to have been committed which arise out of the same transaction. The defence contends that all four charges should be tried together under section 170 C.P.C.

B In the event, the learned President ordered the trial to proceed on the first three charges and stayed the hearing of the fourth charge. At the request of the defence yesterday, the learned President adjourned further hearing to Monday February 26, 1979 to enable this court to give the necessary directions under section 35 of the Courts of Judicature Act, 1964.

C At the outset it must be said that the prosecution's concern is the legality of the trial. Such concern is understandable in view of the Privy Council's decision in *Subramania Ayyar v. King-Emperor*⁽¹⁾ and followed in *Chin Choy v. Public Prosecutor*⁽²⁾ which held that where charges are tried together in contravention of any of the provisions of the Criminal Procedure Code there is an illegality which cannot be cured and that any convictions had cannot be sustained.

D The question then is whether these four charges can be tried together. The general rule is that every accused person should be charged and tried separately for every distinct offence: section 163 C.P.C. This general rule, however, is subject to four exceptions, viz.:

- (i) Not more than three offences of the same kind committed within the space of 12 months may be tried together: section 164 C.P.C.
- (ii) One trial for all offences committed by the same person arising out of the same transaction. There is no limit as to the number of charges that may be preferred against an accused person at such trial: section 165 C.P.C.
- (iii) Where on the same set of facts several offences are disclosed and it is doubtful which particular offence to charge; the accused may be charged with all the offences disclosed or in the alternative for every such offence. There is no limit to the number of charges: section 166 C.P.C.
- (iv) Where several accused persons commit the same offence or several offences of the same kind or different offences in the same transaction, then all the accused persons can be charged with committing all the offences at the same trial. Here again there is no limit to the number of charges: section 170 C.P.C.

In *Lim Yean Leong v. Public Prosecutor*⁽³⁾ it was held by the Court of Appeal that these four exceptions are cumulative and not mutually exclusive. The Privy Council came to the same decision in *Babulal Choukhani v. Emperor*.⁽⁴⁾ These authorities are fully discussed by the Court of Appeal in *Cheong Sik Kwan v. Public Prosecutor*.⁽⁵⁾

In the present case there are eight accused persons and four charges and their joint trial is forbidden by section 163 C.P.C. unless the case falls within

one of the four exceptions. Section 164 C.P.C. does not apply because there are more than one accused and there are four charges. The only exception within which it could fall is section 170 C.P.C. The question arises whether the four offences charged were committed "in one series of acts so connected together as to form the same transaction". It was held in *Babulal Choukhani v. Emperor, supra*, that the relevant point of time in the proceedings at which the condition as to sameness of accusation must be fulfilled is the time of accusation and not that of the eventual result. In other words the question must be decided at the time the charges are preferred. At this stage the only material before the court are the charges. In *Chin Choy v. Public Prosecutor, supra*, the Court of Appeal held that the best test to apply is that laid down in *Amrita Lal Hazra v. Emperor*⁽⁶⁾:

"It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily indicated: they are proximity of time, unity or proximity of place, continuity of action and continuity of purpose or design."

Now, applying this test to the present case, a perusal of the charges show:

- (i) Proximity of time — all the four offences were alleged to have been committed at the same time;
- (ii) Unity or proximity of place — all the four offences were alleged to have been committed at the same place;
- (iii) Continuity of action — all the four offences are the same and committed at the same time and place; and
- (iv) Continuity of purpose or design — all the eight accused are charged with having committed all four offences and in all four charges the prosecution allege common intention by invoking the provisions of section 34 of the Penal Code.

I therefore, hold that this case falls within the exception contained in section 170 C.P.C.

Be that as it may, the learned Deputy Public Prosecutor contends that it is for the prosecution to determine whether to proceed with three or four charges on the grounds that it is only the prosecution that is in possession of the facts of the case against the accused which knowledge is unknown to the defence or the court and therefore in the best position to determine the *conduct* of any case. Further by reason of Article 145(3) of the Federal Constitution and section 376 C.P.C. the Public Prosecutor has absolute discretion to institute, *conduct* or discontinue all criminal prosecutions. In particular, his argument is that the discretionary power of the Public Prosecutor to *conduct* criminal prosecutions includes the power to determine whether charges preferred by the prosecution against an accused person or persons should be heard by the court separately or jointly. Or to put it in another way, the contention is that it is for the prosecution and not the court to decide in this case whether to proceed with three or four charges. The authority for this proposition is said to be *Public Prosecutor v. Datuk Harun bin Haji Idris & Ors.*⁽⁷⁾

A where at page 119 the court dealt with the powers of the Public Prosecutor in criminal prosecutions with particular reference to Article 145(3) of the Federal Constitution and section 376 C.P.C. In my view that authority does not support the proposition of the learned Deputy Public Prosecutor. In fact it is to the contrary since it was there held (with which I respectfully agree):

B "Conduct of criminal prosecutions and proceedings in Article 145(3) cannot connote the regulation of criminal procedure or of the jurisdiction of the courts or the power or discretion to do so."

Now section 170 C.P.C. specifically provides:

C "when more persons than one are accused of the same offence ... they may be charged and tried together or separately as the court thinks fit, ..."

It is plain that the power to order separate or joint trials is a power exercisable by the court and not the prosecution. I am fortified in my view by the observation made by the Court of Appeal in *Chin Choy v. Public Prosecutor, supra*, where at p. 238 the court said:

D "When charges are wrongly joined, the prosecutor should be asked to elect before the pleas are taken which charge or charges he wishes to proceed on, and thus avoid a trial which is illegal and bad. As a practice, charges which are not capable of being tried together should be made on separate charge sheets and the subject of separate trials."

E In *R. v. Grondkowski* and *R. v. Malinowski*⁽⁸⁾ the Court of Appeal held that the granting or refusing of the application for separate trials is a matter of discretion for the trial judge, and where such discretion had been judicially exercised the Court of Criminal Appeal will not interfere unless it appears that a miscarriage of justice has resulted either from the granting or the refusal of the application.

F In exercising its discretion, the court should bear in mind that the mischief of section 163 C.P.C. is to prevent unfairness or embarrassment to the accused —

(i) by the confusion of issues;

(ii) by introduction of evidence tending to show that he is guilty of some other offence.

G If the offences are in the same transaction neither of these embarrassments arise: *R. v. Sakandar Khan*⁽⁹⁾ and *Mohamed Ramly b. Hj. Rasip v. Public Prosecutor*⁽¹⁰⁾:

H I accordingly hold that the discretionary power to order whether the charges should be heard jointly or separately is that of the court and not the prosecution.

There will be an order that the Sessions Court Kelang be directed to proceed with the trial on Monday February 26, 1979 on all four charges jointly under section 170 C.P.C.

Order accordingly.

Solicitors: Vijendran & Co.